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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-174

ALVIN L. GOLDMAN and
ELISABETH C. GOLDMAN, ... PETITIONERS,

v

COMMISSIONER OF
INTERNAL REVENUE, ... RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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ALVIN L. GOLDMAN and
ELISABETH C. GOLDMAN, ... PETITIONERS,

v.

COMMISSIONER OF
INTERNAL REVENUE, ... RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on May 30, 1974 and the order of that court entered on July 11, 1974.

OPINIONS BELOW AND JURISDICTION

Judgment of the United States Court of Appeals for the Sixth Circuit, entered on May 1974 as case No. 73-2079, appended hereto, is not yet officially reported. On July 11, 1974 the Court of Appeals without opinion entered its order denying Petitioner's motion to modify the judgment so as to remove the taxing of costs. Judgment of the United States Tax Court, entered on

July 31, 1973, appended hereto, is reported as T.C. Memo. 1973-132.

This is a Petition for Certiorari from the final judgment and order of the Court of Appeals and jurisdiction is based on 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. When a case of first impression raises substantial challenges to the validity of a Treasury Regulation and when that regulation concerns a tax deduction of a nature and size so that normally it would be impractical to seek judicial review respecting deductibility, does a Court of Appeals abuse its discretion under 28 U.S.C. § 2412 and improperly chill the statutory and constitutional right to judicial review of an administrative court's decision by taxing costs in favor of the government in an amount equal to almost two third's of the tax liability in issue and in an amount reflecting grossly overstated costs of reproducing the government's brief?

2. Does Treas. Reg. 1.217-1(c)(3) produce a result which Congress clearly did not intend under the family moving expense provision, Internal Revenue Code § 217, by prohibiting a taxpayer from deducting for family moving expenses when the taxpayer moves his family back to his tax home from a distant principal place of work at which he was temporarily assigned for one year?

3. When a taxpayer moves his personal belongings by interstate moving van back to his tax home

from a location at which he worked while temporarily away from that home, if the expense of that move is not deductible under Internal Revenue Code § 217, then is it deductible under § 162(a)(2) as an away from home trade or business expense?

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 2412, 80 Stat. 308 in pertinent part reads:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. . . .

26 U.S.C. § 162(a)(2) in pertinent part reads:

> (a) There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . . .
>
> (2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business . . . .

26 U.S.C. § 217 in pertinent part as it read when this issue arose was as follows:

(a) DEDUCTION ALLOWED — There shall be allowed as a deduction moving expenses paid or incurred during the taxable year in connection with the commencement of work by the taxpayer as an employee at a new principal place of work.

(b) DEFINITION OF MOVING EXPENSES —

(1) IN GENERAL — For purposes of this section, the term "moving expenses" means only the reasonable expenses —

(A) of moving household goods and personal effects from the former residence, and

(B) of traveling (including meals and lodging) from the former residence to the new place of residence.

(2) INDIVIDUALS OTHER THAN TAXPAYER — In the case of any individual other than the taxpayer, expenses referred to in paragraph (1) shall be taken into account only if such individual has both the former residence and the new residence as his principal place of abode and is a member of the taxpayer's household.

(c) CONDITIONS FOR ALLOWANCE — No deduction shall be allowed under this section unless —

(1) the taxpayer's new principal place of work —

(A) is at least 20 miles farther from his former principal residence than was his former principal place of work, . . .

(2) during the 12-month period immediately following his arrival in the general location of his new principal place of work, the taxpayer is a full-time employee, in such general location, during at least 39 weeks. . . .

[Amendments to 26 U.S.C. § 217 made by P.L. 91-172, 83 Stat. 577 do not affect the issue in this appeal]

Tres. Reg. 1.217-1(c)(3) in pertinent part as it read when this issue arose was as follows:

(3) Principal place of work.

(i) A taxpayer's "principal place of work" usually is the place at which he spends most of his working time. Generally, where a taxpayer performs services as an employee, his principal place of work is his employer's plant, office, shop, store or other property. However, a taxpayer may have a principal place of work even if there is no one place at which he spends a substantial portion of his working time. In such case, the taxpayer's principal place of work is the place at which his business activities are centered — for example, be-

cause he reports there for work, or is otherwise required either by his employer or the nature of his employment to "base" his employment there. . . .

(iii) In general, a place of work is not considered to be the taxpayer's principal place of work for purposes of this section if the taxpayer maintains an inconsistent position, for example, by claiming an allowable deduction under § 162 (relating to trade or business expenses) for traveling expenses "while away from home" with respect to expenses incurred while he is not away from such place of work and after he has incurred moving expenses for which a deduction is claimed under this section.

[Amendments to Reg. 1.217-1(c)(3) made July 10, 1972 by Tres. Dec. 7195 do not affect the issue in this appeal.]

STATEMENT OF THE CASE

While on leave of absence from his regular professorial employment at the University of Kentucky College of Law, taxpayer Alvin Goldman served a one year assignment in Washington, D.C. as Professor in Residence on the staff of an N.L.R.B. Member. In 1968, at the end of that assignment, the taxpayers returned to their Lexington, Kentucky tax home and deducted from their 1968 joint income tax return, as a

§ 217 family moving expense item, the $726.75 cost incurred in returning their personal effects and household goods to Lexington. Section 217 allows such deductions where a move to "a new principal place of work" involves a locale of at least a specified distance from the previous place of work and employment at the new locale for at least 39 weeks. There is no dispute but that the statutory requirements of distance and duration of work were satisfied by the taxpayers. Also, there is no dispute as to the accuracy of the expenses deducted. Similarly, there is no dispute but that at all times relevant, the taxpayers' tax home, as defined under the § 162(a)(2) away from home travel expenses provision, remained in Lexington, Kentucky.

The Commissioner for Internal Revenue rejected the family moving expense deduction on the grounds that pursuant to Reg. 1.217-1(c)(3) such a deduction is not available if the move in question did not involve a change in the taxpayer's tax home (a term not used in § 217); that is, if it did not involve moving from one permanent or indefinite place of employment to another.[1] The Commissioner did allow $90.30 of the moving expenses, representing Alvin Goldman's travel back to Lexington, to be deducted as a § 162 away from home business expense. The disallowance of the

---

1. In Rev. Rul. 74-242, I.R.B. 1974-21,10, the Commissioner recently reaffirmed this position explaining that, under the Commissioner's interpretation, family moving expenses are deductible only if the move is on a "permanent or indefinite basis as distinguished from a temporary basis."

remainder of the family moving expenses, including the cost of moving Alvin Goldman's household goods and personal effects, resulted in a net additional tax liability of $150.50.

The taxpayers appealed to the administrative court, the United States Tax Court, noting that the Commissioner's position is contrary to the § 217 purpose of facilitating job related moves, as revealed in its legislative history. Further, the Commissioner's position equates "principal place of work" with a tax home, a position which conflicts with Congressional intent as revealed by avoidance of the term of art "home" or "tax home" in drafting § 217, and by other textual indicators of legislative intent. Also, the taxpayers noted that the Commissioner's position improperly adds a temporal dimension beyond the 39 week time element specified in § 217. The taxpayers alternatively argued that even if Reg. 1.217-1(c)(3) is valid, that part of the expense of moving the furnishings and personal effects needed by Alvin Goldman during his Washington stay ($490.75) was deductible under § 162(a)(2) as an ordinary and necessary away from home business or trade expense.

Only one prior case, *In re Schweighardt*, 54 T.C. 1273 (1970), had raised in any court, administrative or judicial, the instant challenge to the validity of Reg. 1.217-1(c) (3). That case was presented without counsel by a non-lawyer taxpayer whose argument essentially was an assertion of unfairness. *Schweighardt* was decided against the taxpayer. No case had previously raised the taxpayer's alternative claim for additional § 162 deduc-

tions. The same judge who decided *Schweighardt* heard the instant one and held for the Commissioner.

The taxpayers appealed per 26 U.S.C. § 7482 to the Court of Appeals for the Sixth Circuit. The taxpayers' 27 page brief and 17 page reply brief relied on legislative history, on Congress's choice of statutory terminology, on the logical necessities of the textual and conceptual structure of the tax laws, and on the inconsistencies created by the Commissioner's policy in denying family moving expense deductions to persons who move back to their tax home from a distant, temporary away from home principal place of work.

The Court of Appeals affirmed the Tax Court on the basis that great deference is due the Commissioner's regulation. Relying on the statute's prohibition of § 217 deductions where the taxpayer is employed at the new location for less than 39 weeks, and supported by a single "see also" citation to a page in the House Report providing no guidance respecting the basic issue, the Court of Appeals concluded that Reg. 1.217-1 (c)(3) is consistent with Congressional intent. The Court of Appeals also rejected the taxpayers' alternative approach concerning away from home travel deductions. In sole support of that rejection the appellate court relied on case authorities which are clearly inapplicable inasmuch as they concern taxpayers whose moving expenses involved a change of tax home and thus were not qualified under § 162 as being expenses incurred while away from ones tax home. The opinion of the Court of Appeals also emphasized that the tax-

payers had for the tax year in question already received a sizeable (for a taxpayer of modest income) away from home business expense deduction under section 162(a)(2) for Alvin Goldman's personal living expenses in the District of Columbia. Finally, the Court of Appeals' judgment provided for the taxing of costs to the taxpayers and a Bill of Costs was submitted by the government in the amount of $90.30 of which $81.60 represented xeroxing the government's brief at a charge of 8¢ per page.

The taxpayers challenged the Bill of Costs and moved to have it stricken on the grounds that the taxing of costs is unjust in a matter of judicial first impression in which substantial challenges are made to the exercise of administrative power and especially when the financial stake involved is so small as normally to deter a party from seeking judicial review. Further, the taxpayers challenged the Bill of Costs as reflecting an amount grossly in excess of the actual costs of copying the government's brief. The Attorney General submitted no response to the motion; the motion was denied by the court without opinion.

REASONS FOR GRANTING THE WRIT

I

THE LEGITIMACY OF ADMINISTRATIVE AUTHORITY IS DEPENDENT UPON THE OVERSIGHT OF JUDICIAL REVIEW. NEVERTHELESS, THE POSSIBILITY IS MOST REMOTE THAT THIS COURT OR ANY OTHER ARTICLE III COURT WILL EVER AGAIN HAVE AN OPPORTUNITY TO REVIEW THE SUBSTANTIAL CHALLENGES TO THE VALIDITY OF THE EXERCISE OF ADMINISTRATIVE POWER AT ISSUE HERE BECAUSE NORMALLY THE INDIVIDUAL'S FINANCIAL STAKE IS TOO SMALL TO JUSTIFY THE EXPENSE OF SEEKING JUDICIAL REVIEW IN A CASE OF THIS SORT, ESPECIALLY WHEN THAT EXPENSE IS COMPOUNDED BY THE TAXING OF COURT COSTS AS THEY WERE BELOW.

A. A Reasonable Opportunity to Obtain Judicial Review is Essential to the Legitimacy of Administrative Power —

Preserving the realistic opportunity to judicially test the legitimacy of administrative action is essential to our system of constitutional government. As Professor Jaffe has stated: "The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid. . . . [T]he availability of judicial review is, in our system and under our tradition, the necessary premise of legal validity." [L. Jaffe, *Judicial Control of Administrative Action* 320-321 (Stu. ed. 1965).] As Roscoe Pound put it, the judicial function of keeping agencies within the scope of their legislated

authority and purpose "is not legalism, it is constitutionalism." [R. Pound, *Administrative Law* 78-79 (1942).] Similar observations can be found in numerous other authorities. [*E.g.*, *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring); E. Gellhorn, *Administrative Law and Process* 44-45 (1972).] Thus, whether as a matter of statutory or constitutional right, as this Court noted in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410-413 (1971), judicial review is legally available whenever there is "law to apply".

B. The Expense of Litigation Can Pose a Practical Barrier to Judicial Review —

Even though judicial review is central to maintaining lawful control over administrative power, practical impediments to securing such review can transform the opportunity for judicial scrutiny into a mirage. "The extent to which actual expenses are allowed as costs can have a significant effect upon the encouragement or discouragement of litigation." (6 Moore, Federal Practice ¶ 54.70 at p. 1303-04). This Court recognized that danger when, in *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 235 (1964), it held that items of cost to a winning party must be examined with careful scrutiny so as to prevent litigation expenses from becoming "so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be." As Mr. Justice Goldberg's concurring opinion in *Farmer* noted, quoting with approval from an opinion below, the American rule requiring

litigants to themselves bear all but minimal court costs is "a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means." (379 U.S. at 237.)

The point at which costs can discourage seeking judicial review of administrative action depends, of course, on the amount in dispute. Professor Davis reports that review of federal administrative action involving an issue of average complexity entails expenses upward from $5,000, and that "even for the simplest cases the minimum may be about $1,500." [K. Davis, *Discretionary Justice* 155 (1971).] The result, he concludes, is that "judicial review is unavailable for small cases." (Id. at 229.)

C. The Amount At Stake Normally Would Preclude Seeking Judicial Review of the Commissioner's Refusal to Allow Family Moving Expenses to a Taxpayer Who Undertook a Temporary Assignment Away from His Tax Home —

Deductions for family moving expenses in 1971 were taken on 1,104,427 income tax returns in an average amount of about $942. In 1971 most taxpayers paid income taxes at a top rate of less than 25%. The average rate for total taxes paid on net taxable income therefore was under 25%. Thus, the value of the tax savings based on the family moving expense deduction to most taxpayers taking that deduction was less than $235. [Dept. of Tres., *Statistics of Income 1971 — Individual Tax Returns* pp. 95, 112, 139-140.] Clearly, with this sort

of financial stake, normally the taxpayer in dispute with the Commissioner concerning such a deduction will find it impractical to seek judicial review. Even if we consider the occasional taxpayer whose stake in the moving expense deduction is five or even ten times the average amount, the expense of litigation will preclude that avenue of relief.

It is not surprising, therefore, that in Fiscal 1973, although over 80 million individual income tax returns were filed, and over 36,000 audited income, estate and gift tax returns were referred to the Revenue Service's appellate division on disputed items, only 9,642 taxpayers petitioned in civil cases to the Tax Court. Moreover, only 1,207 cases were decided by that administrative tribunal. The filtering process worked even more harshly in keeping cases from judicial scrutiny. A mere 366 such cases were decided by the District Courts or Court of Claims, 364 by the Courts of Appeals and 9 by Supreme Court decision. (Commissioner of Internal Revenue, *Ann. Rpt.* — 1973 at p. 26.) None of those litigated cases, other than the Tax Court decision in the instant case, involved § 217. In over 10 years since its adoption, only the instant case involved judicial review of § 217 as applied to temporary job related moves rather than moves involving a tax home change. Surely, with an income tax system as comprehensive and complex as ours, surely with a provision as complex as § 217 and affecting so many taxpayers, the lack of more frequent appeal for judicial review reflects the serious barrier to such review posed by litigation expenses.

D. The Instant Case Provides an Extraordinary Opportunity to Preserve the Integrity of the Administrative Process by Judicially Reviewing the Validity of the Commissioner's Policies Respecting Moving Expense Deductions Taken in Connection with a Temporary Job Assignment.

Unlike the average taxpayer, the instant taxpayer is legally trained and, as an academician, had the time flexibility to enable him to appeal from Tax Court. Even then, but for the secretarial and office machine facilities available to him, it would have been impractical to seek judicial review of a disputed liability of barely $150. Filing fees, postage, cost of travel to oral argument, and the like, would have been enough to discourage taking this appeal to the Court of Appeals but for taxpayer's realization that a large class of interests were dependent on the outcome of his case. Even with those class interests in mind, had the taxpayer realized that there was a risk of additional liability for costs in an amount equal to almost two third's of his total stake in the appeal, the amount of costs imposed below, it is unlikely that he would have found an appeal possible. Nor, of course, would this instant petition for certiorari be possible were it not for the interest and generosity of the National Taxpayers Legal Fund, Inc. which has provided a small grant to cover the out-of-pocket expenses of seeking Supreme Court review.

Thus, absent a grant of this petition for certiorari, likely the determination of a single panel of a single Circuit will become the sole judicial authority constru-

ing Congressional intent respecting the deductibility of family moving expenses by persons who take temporary job assignments for at least 39 weeks at locations distant from their tax home.

II

MANY TAXPAYERS ARE AFFECTED BY THE ADMINISTRATIVE REVOCATION OF THE FAMILY MOVING EXPENSE DEDUCTION FOR PERSONS INCURRING SUCH EXPENSES IN MOVING TO AND FROM DISTANT TEMPORARY JOB ASSIGNMENTS OF AT LEAST 39 WEEKS DURATION.

In Section 217 of the Revenue Code, Congress gave taxpayers a right to deduct family moving expenses for job related moves to distant sites so long as they involve work for at least 39 weeks. At issue here is the revocation by the Commissioner, through Reg. 1.217-1(c)(3), and by the court below, of that deduction to the extent that it applies to the many taxpayers who make such moves for temporary as contrasted with permanent or indefinite job assignments.

Temporary job assignments of prolonged duration at distant sites can arise in many contexts. One such situation is the result of a policy adopted by Congress in 1971 to encourage such assignments of government employees between federal and state and local government employment and to encourage further education by such personnel. (84 Stat. 1919.) Under that policy, Congress provides funds to facilitate such temporary assignments between federal and state and local governments, in-

cluding funds which can be used to pay for family transportation and the moving of household goods and personal effects. [42 U.S.C. §§ 4711, 4712; 5 U.S.C. §§ 3372, 3375(2),(3).] Hundreds of employees have participated in this program and the annual number will likely increase as the program matures. (U.S. Civil Serv. Comm'n., *Ann. R. — 1972* at 42-43.) Similarly, Congress subsidizes local government scholarships to cover employee salaries, tuition, books, transportation and travel for full-time graduate level study for up to 2 years. (42 U.S.C. § 4745.) Yet, under the decision at issue in the instant case, the family moving expenses of such employees in going to their temporary work assignments are not deductible because the assignment is not of a permanent or indefinite nature, and any funds paid by the government toward covering those expenses will be reduced in value because they will be taxed as income. Alternatively, if the Commissioner treats those allowances as it treated such employer payments prior to the enactment of § 217, then the employee will not have to treat the allowance as income because it was paid by the employer. However, where the government grant does not expressly cover family moving expenses, then the government employee will not only have to asborb that cost himself, he will additionally not be able to deduct from income the costs of moving his family to the temporary assignment. [See Rev. Rul. 54-429, C.B. 1954-2 53; *Commissioner* v. *Mandel*, 351 F.2d 580 (4th Cir. 1965); *Koons* v. *United States*, 315 F.2d 542 (9th Cir. 1963); *John Cavanaugh*, 36 T.C. 300 (1961).] Such a result is clearly contrary to Congressional intent under

both the 1964 tax legislation and the 1971 Intergovernmental Personnel Act. [See Hs. R. 749 in 64 C.B.-1 (pt. 2) p. 183 and Hs. R. 91-1733 in 3 U.S. Code, Cong. & Admin. News 5879, 5898-99 (1970.]

Another category of taxpayers whose right to the § 217 family moving expense deduction is affected by the outcome of the instant case is the academic on leave for at least 39 weeks. For example, a recent ruling by the Commissioner determined that a professor on a 10 month paid sabbatical leave, during which he worked at postgraduate study and research, could not take the § 217 deduction. (Rev. Rul. 74-242, IRB 1974-21, 10.) The reason given was the temporary nature of the assignment. There are about 377,000 full time college and university level teachers in the United States,[2] of which four out of five are married, and over 60% have children. (See note 2 below.) A study by the Washington State Council on Higher Education indicates that it is reasonable to assume that in any year about one percent (or about 3,770) of all full time faculty will be on leave. [*Professional Leave Report* 1971-72 at Table II. See also, Eberle & Thompson, *Sabbatical Leaves in Higher Educ.* (HEW ED 072754, 1972).] Of these approximately 3,770 taxpayers, it is reasonable to assume that in any given year about 1,000 will be engaged in away from home activities similar to the instant taxpayer's 1967-68 assignment or the sabbatical work assignments of the taxpayer involved in the above cited Revenue Rul-

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2. This figure is extrapolated from the data published in HEW, *Digest of Educ. Statistics* — 1973 pp. 88-89.

ing, and that some family moving expenses will be incurred. In addition, many grade and high schools now give paid leaves for sabbatical work designed to intellectually enrich the teacher or unpaid leaves during which the teacher is engaged in valuable nonclassroom work experience.

Industry, too, uses the temporary assignment for training, job enrichment and other purposes, often at distant locations for a period of at least 39 weeks. Thus a person taking such a temporary assignment in lieu of a layoff at his permanent employment locale or to fill the employer's need for expertise in starting up a new operation or process, or for some similar reason, will likewise be affected by the decision in this case prohibiting persons from deducting family moving expenses incurred in the course of a move related to a temporary job assignment.

Thus, despite Congress's effort through § 217 to assist the taxpayer in meeting the expenses of keeping the family unit together whenever a distant job related move involves a work assignment of at least 39 weeks, the numerous taxpayers taking temporary job assignments at distant sites will be deprived of the benefit of Congressional intent because of the erroneous policy of the Commissioner and the incorrect decision of the court below.

III

TO AVOID UNDUE CHILLING OF THE OPPORTUNITY TO OBTAIN JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS, IT IS IMPORTANT THAT THIS COURT PROVIDE GUIDANCE TO THE LOWER COURTS RESPECTING THE SORT OF CIRCUMSTANCES IN WHICH THE TAXING OF COSTS FOR THE GOVERNMENT DOES NOT SERVE THE INTERESTS OF JUSTICE REQUIRED BY 28 U.S.C. § 2412.

At common law, court costs were neither receivable nor payable by the government. "The king . . . shall neither pay nor receive costs; . . . as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them." [3 Blackstone, *Commentaries* 400 (vol. 4 Tucker ed. 1803).] Through 28 U.S.C. § 2412, Congress has reversed that position by allowing costs to be taxed both in favor of and against the federal government. However, in revising that provision in 1966, Congress left the taxing of costs for or against the government as a matter of judicial discretion, and in the accompanying committee reports emphasized that: "The bill does not require that costs be taxed . . ., it merely makes it possible for the court, *when deemed just*, to award costs to whichever side prevails in the case before it." [Hs. R. 1535 at p. 4, Sen. R. 1329 at p. 3, 89th Cong., 2d Sess. (1966) (Emphasis added.) Also, *United States* v. *12.85 Acres*, 321 F. Supp. 651 (E.D. Tenn. 1971); R. Peck, *Taxation of Costs*, 43 F.R.D. 55, 56 (1967).]

As discussed above, the risk that costs will be taxed, just like the burden of other litigation expenses,

can be a factor which deters seeking judicial review. Where, as in the instant case, costs for reproducing a brief are taxed on a basis which far exceeds the reasonable expense actually incurred,[3] the prospects are increased that meritorious appeal will be deterred because the amount in dispute does not warrant the expense and financial risk involved in further litigation.

Because judicial review is so important to maintaining the legitimacy of the administrative system, it is important for this Court to provide the federal courts with clear guidance concerning the exercise of discretion in taxing costs against those who obtain judicial review of administrative determinations. At the very minimum, to assure the just application of discretion under 28 U.S.C. § 2412, certainly this Court will want to eliminate the aggravating impact of court costs in deterring parties from seeking judicial review in matters, such as the instant one, which are cases of first impression for the federal courts where substantial arguments have been raised challenging the validity of administrative action, where the nature of the normal stake in the dispute itself would in most cases deter a party from seeking judicial review, where the amount of the court costs equals a substantial portion of the

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3. The Bill of Costs charged 8c per page for xeroxing. Petitioner's challenge in their motion to vacate the costs asserted that this was a gross overcharge. The Attorney General offered no response. (The Commonwealth of Kentucky under its office copier contract with Xerox bills costs to governmental units using 10,000 copies a month at $0.03855 per copy on a Xerox 660, and slightly less per copy on a Xerox 813 and a Xerox 914.)

total amount in dispute (here almost two thirds), and where the Bill of Costs is based on figures that exaggerate the amount expended for the item being taxed. Indeed, the Court will probably want the federal bench to withhold taxing costs in any situation involving any single one of the above factors, let alone an appeal such as the instant one which involved all of them.

CONCLUSION

For the above reasons the writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on May 30, 1974, and the order of that court entered on July 11, 1974.

Respectfully submitted,

ALVIN L. GOLDMAN, Pro Se and
Attorney for Petitioner
Elisabeth C. Goldman

APPENDIX

No. 73-2079

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

ALVIN L. GOLDMAN AND
ELISABETH C. GOLDMAN, APPELLANTS,

v.

COMMISSIONER OF
INTERNAL REVENUE, APPELLEE.

Appeal from the Decision of the
United States Tax Court

Decided and Filed May 30, 1974.

Before PHILLIPS, Chief Judge EDWARDS and McCREE, Circuit Judges.

PHILLIPS, Chief Judge. Mr. and Mrs. Alvin L. Goldman (taxpayers) appeal from an adverse decision of the United States Tax Court, upholding the Commissioner's determination of a $150.50 deficiency in taxpayers' 1968 joint federal income tax return. We affirm.

For a comprehensive statement of the facts, reference is made to the opinion of Judge Irene E. Scott. T. C. Memo 1973-132.

Mr. Goldman, a law professor at the University of Kentucky, located in Lexington, Kentucky, took a year's leave of absence beginning in August 1967 to join the staff of a member of the National Labor Re-

lations Board in Washington, D. C. Mr. Goldman moved his wife and child to Washington where the family resided for approximately one year. In August 1968, the family returned to Lexington where Mr. Goldman resumed his professorial duties.

On their joint income tax return for 1968, taxpayers claimed deductions under § 162(a)(2) of the Internal Revenue Code of 1954, 26 U.S.C. § 162(a)(2), in the amount of $2,469.72 for travel expenses incurred while temporarily "away from home" in pursuit of a trade or business. Most of these deductions were for expenses incurred while in Washington, e.g., lodging for seven and a half months during 1968 at $200 per month, meals for Professor Goldman (34 weeks at $21 per week), etc. The Commissioner allowed all of these claimed deductions.

In addition, taxpayers also claimed a deduction on their 1968 return of $726.75 for the expenses of moving from Washington back to Lexington. Taxpayers asserted that these moving expenses were deductible under § 217(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 217(a), as moving expenses paid in commencement of employment "at a new principal place of work." The Commissioner disallowed all of these claimed expenses except $82.30, which amount represented Mr. Goldman's separate travel expenses on the trip from Washington to Lexington.

Thereafter, the Commissioner asserted a deficiency of $152.38, and the taxpayers initiated this action in the Tax Court. Judge Scott rejected the conten-

tions of the taxpayers but, consistent with a concession of the Commissioner with respect to Mr. Goldman's actual travel expenses from Washington to Lexington, reduced the deficiency to $150.50.

On appeal to this court, taxpayers make two contentions: 1) They should be permitted to deduct under § 217 their personal and family moving expenses incurred in returning from Washington to Lexington. 2) If those moving expenses are not deductible under § 217, then that portion of those expenses which are attributable to Mr. Goldman should be deductible as "away from home" travel expenses under § 162(a)(2). We reject both contentions.

Section 1.217-1(c)(3)(iii), Income Tax Reg., which squarely governs disposition of this case, provides as follows:

> "In general, a place of work is not considered to be the taxpayer's principal place of work for purposes of this section if the taxpayer maintains an inconsistent position, for example, by claiming an allowable deduction under section 162 (relating to trade or business expenses) for traveling expenses 'while away from home' with respect to expenses incurred while he is not away from such place of work and after he has incurred moving expenses for which a deduction is claimed under this section."

In *Schweighardt* v. *Commissioner*, 54 T.C. 1273 (1970), the Tax Court, per Judge Scott, specifically upheld this regulation.

Congress has delegated to the Commissioner the responsibility for prescribing "all needful rules and regulations for the enforcement" of the Internal Revenue Code. 26 U.S.C. § 7805(a). When, as here, Congress has expressly delegated authority to the Commissioner to promulgate regulations under a specific Code section, the resulting legislative regulations are accorded even greater weight than that normally accorded interpretative regulations. 1 Mertens, *Law of Federal Income Taxation*, § 3.20, at 41 (Rev. ed. 1969).

Section 1.217.1(c)(3)(iii) of the regulations is consistent with § 217 of the Code and its underlying congressional purpose. The regulation, in effect, provides that taxpayer's employment at a new location be on a permanent or indefinite basis and not merely temporary in order to meet the "new principal place of work" requirement of § 217. This regulation is entirely consistent with § 217, which obviously was designed to preclude a deduction for expenses in moving to temporary job sites. In fact, § 217(c)(2) of the Code provides that the deduction is not allowed unless the taxpayer is employed full time at the new location for 39 weeks in the twelve month period following the move. See also H. Rep. No. 749, 88th Cong., 1st Sess., p. 60 (1964-1 Cum. Bul. (Part 2) 125, 184).

In this case, although taxpayers resided in Washington more than the requisite 39 weeks, they were permitted to deduct certain Washington expenses under § 162 for being "away from home." It would be patently inconsistent with the language and intent of § 217 to allow them to deduct under 217 moving expenses to a

"*new* principal place of work" when, in fact, they were returning to their previous home, Lexington. We, therefore sustain Income Tax Reg. 1.217-1(c)(3)(iii) and affirm the Tax Court's denial of taxpayers' claimed § 217 deductions.

With respect to taxpayers' alternative contention, *Wilson* v. *Commissioner*, 412 F.2d 314 (6th Cir. 1969) controls. In *Wilson*, the court followed *Commissioner* v. *Dodd*, 410 F.2d 132 (5th Cir. 1969) which held that unreimbursed moving expenses are not deductible as ordinary and necessary business expenses under § 162(a) or as travel expenses while away from home under § 162 (a)(2).

Assuming that taxpayers were able to prove that the cost of moving Mr. Goldman's furnishings from Washington to Lexington is an ordinary and necessary business expense under the facts of this case, *Wilson* would preclude taxpayers' use of the § 162 deduction. Accordingly, the Tax Court's denial of taxpayers' claimed § 162 deduction is affirmed.

We agree with the Tax Court that the taxpayers should not be allowed double tax relief which was not intended by Congress. Taxpayers were permitted to deduct such Washington living expenses as rent, meals and laundry on the basis that they were away from home. The sum of these deductions which were allowed approximated four times the amount of the disallowed deductions. Taxpayers contend that the decision of the Tax Court impairs labor mobility. We find no such impairment under the facts of this case.

In any event, this is a matter for concern of the Congress not of the courts.

Affirmed.

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T. C. Memo. 1973-132

UNITED STATES TAX COURT

ALVIN L. GOLDMAN and
EDISABETH C. GOLDMAN, PETITIONERS,

v.

COMMISSIONER OF
INTERNAL REVENUE, RESPONDENT

Filed June 19, 1973
Entered July 31, 1973

MEMORANDUM FINDINGS OF FACT AND OPINION

SCOTT, JUDGE: Respondent determined a deficiency in petitioners' income tax for the calendar year 1968 in the amount of $152.38.

The issues for decision are:

(1) Whether expenses incurred by petitioners in transporting their household goods from Washington, D.C., where one of petitioners was temporarily away from home in the pursuit of a trade or business within the meaning of section 162(a)(2)[1] to Lexington, Kentucky where [2] he was employed as a professor on a year's leave of absence, are deductible as moving expenses under section 217.

(2) In the alternative, whether the portion of the cost of moving household goods which the peti-

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1. All references are to the Internal Revenue Code of 1954.

tioner who was employed in Washington, D.C. would have moved even if he were a single individual is allowable as an ordinary and necessary business expense under section 162.

FINDINGS OF FACT

Most of the facts have been stipulated and are found accordingly.

Petitioners, husband and wife who filed their joint Federal income tax return for the calendar year 1968 with the Internal Revenue Service Center at Cincinnati, Ohio, resided at Lexington, Kentucky at the time they filed their petition in this case.

Alvin L. Goldman (hereinafter referred to as petitioner) is a Professor of Law at the University of Kentucky and was so employed during the taxable year 1968. In August 1967 petitioner, while on a 1-year leave of absence from the University of Kentucky, commenced employment as a Professor in Residence on the staff of Member Zagoria, National Labor Relations Board, Washington, D.C., for a period not to exceed 1 year.

At that time, petitioner moved himself, his wife, and one child and their household goods from Lexington, Kentucky to an unfurnished apartment in Washington, D.C. Prior to moving their household goods to the District of Columbia in 1967, petitioners had rented a 2-bedroom unfurnished apartment in Lexington, Kentucky. Upon moving, they terminated their lease on this apartment.

[3]

Petitioners investigated the cost of storing their household goods in Lexington and renting furnished quarters in the District of Columbia and the cost of moving their household goods and renting unfurnished quarters in Washington, D.C. Petitioners concluded that the cost would be about the same and decided to move their household goods.

In August 1968 petitioner terminated his employment in Washington, D.C. and returned to Lexington, Kentucky, moving himself, his wife and child, and their household goods back to that city. Petitioners rented a 3-bedroom apartment in Lexington, Kentucky upon their return, and petitioner resumed his duties as Associate Professor of Law at the University of Kentucky.

During the period August 1967 through August 1968, petitioner's "tax home" remained Lexington, Kentucky, and while in Washington, D.C. he was "temporarily away from home" within the meaning of section 162.

On his Federal income tax return for the calendar year 1967, petitioner claimed a total of $2,469.72 as a deduction for travel expenses of which all except approximately $55 was composed of costs of meals, lodging, and incidental expenses of petitioner in Washington, D.C. The deduction claimed by petitioner for lodging was for 7½ months at $200 per month and for meals was for 34 weeks at $21 per week. On the basis that petitioner was away from home within the

meaning of section 162, respondent allowed the deduction claimed by petitioner for all the traveling expenses claimed on his return as expenses while in Washington, D.C. Petitioner, on his return, claimed, in addition to his expenses in Washington, D.C., $726.76 as moving expenses from [4] Washington, D.C. to Lexington, Kentucky, for the cost of moving himself, his wife, his child, and his household furnishings from Washington, D.C. to Lexington, Kentucky. The total amount of the claimed expenses was actually incurred by petitioner.

Respondent disallowed all except $82.30 of these claimed expenses. The $82.30 which respondent did not disallow consisted of automobile mileage at 10 cents per mile and lodging and meals for petitioner. The actual cost of lodging and meals for petitioner on the trip from Washington, D.C. to Lexington, Kentucky was $8 in excess of the amount allowed by respondent, making the total cost of petitioner's transportation, lodging, and meals on this trip $90.30. The cost of moving household goods which would have been moved by petitioner even if he were a single individual is $490.75 excluding the $90.30 cost of transportation, food, and lodging for petitioner on the trip from Washington, D.C. to Lexington, Kentucky. These costs are composed of moving costs for household furnishings of various types such as bedroom, living room and dining room furniture, pictures, dishes, a typewriter, and some books.

OPINION

Petitioner's primary position is that even though he was away from home within the meaning of section 162 while he was in Washington, D.C. and he was returning to his "tax home" in Lexington, Kentucky when he returned from Washington to Lexington, he is entitled to the claimed deduction for moving expenses under the provisions of section 217(a)[2] [5] since his moving expenses were paid in connection with the commencement of work "at a new principal place of work."

Respondent takes the position that petitioner's expenses were not incurred in connection with the commencement by him of work at a new principal place of work. Respondent contends that since petitioner was temporarily away from home within the meaning of section 162 while he was in Washington, D.C., and was during the period August 1967 to August 1968 merely on a 1-year leave of absence from the University of Kentucky where he was employed as a professor that Lexington, Kentucky to which petitioner moved his furniture in August 1968 was not a "new principal place of work" for petitioner within the meaning of section 217. Respondent specifically relies on the provisions of section 1.217-1(c)(3)(iii), Income Tax Regs:

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2. Sec. 217(a) Deduction allowed. — There shall be allowed as a deduction moving expenses paid or incurred during the taxable year in connection with he commencement of work by the taxpayer as an employee at a new principal place of work.

(iii) In general, a place of work is not considered to be the taxpayer's principal place of work for purposes of this section if the taxpayer maintains an inconsistent position, for example, by claiming an allowable deduction under section 162 (relating to trade or business expenses) for traveling expenses "while away from home" with respect to expenses incurred while he is not away from such place of work and after he has incurred moving expenses for which a deduction is claimed under this section.

Respondent points out that in *Robert J. Schweighardt*, 54 T.C. 1273 (1970), we specifically held this provision of respondent's regulations to be a reasonable interpretation of the statute and sustained respondent's disallowance of a moving deduction claimed by a Fulbright scholar for moving household effects and his family from Korea back to the United States since the taxpayer had been considered to be away from home in the pursuit of a trade or business within the provisions of section 162 (a)(2) while he was in Korea.

Petitioner recognizes that there is no factual distinction in the instant case and the *Schweighardt* case but asks that we reconsider our holding in the *Schweighardt* case in the light of his argument. Petitioner argues that respondent's regulation equates the words "principal place of work" with the words "principal place of employment" which has been used in a number of cases as being the definition of "home" within the meaning of section 162. See, for example, *Emil J. Michaels*, 53 T.C. 269, 273 (1969), and cases there cited, in which we pointed out

that we have consistently held that "home" in section 162(a)(2) "means the taxpayer's principal place of employment" but have also recognized an exception to this rule and considered "that the taxpayer's *principal place of work* is not his 'home' for the purpose of section 162 (a)(2) when his employment there is only 'temporary,' as distinguished from 'indefinite' or 'indeterminate'." (Emphasis supplied.)

It will be noted therefore that even though we have used the terms "principal place of employment" and "principal place of work" interchangeably at times, we have not, as petitioner maintains, equated these terms with the word "home" as used in section 162(a)(2) where a taxpayer's "principal place of work" was temporary employment as in the case of this petitioner while in Washington, D.C. It is noted, however, that section 217 refers to moving expenses in connection with "the commencement of work" by the taxpayer at "a new principal place of work." In our view this provision carries with it the idea of beginning work at a new place and not merely returning to a place and an employment from which petitioner had been away on a leave of absence in order that he [7] might be temporarily employed for a short, definite period at another place of employment. We therefore conclude that we correctly held in *Robert J. Schweighardt, supra*, that respondent's regulation is a reasonable interpretation of the statute.

We have not overlooked, in reaching our conclusion, petitioner's argument supported by citations to the legislative history of section 217 that Congress viewed the

enactment of section 217 as encouraging labor mobility as well as equalizing tax treatment between employees who were reimbursed for moving expenses and those who were not. In our view respondent's regulation is not offensive to this purpose of Congress since it is directed only to those situations in which a taxpayer is moving to and from a place that he has considered to be away from his home or his indefinite principal place of employment by claiming and being allowed a deduction under section 162 for traveling expenses "while away from home." The allowance of a deduction for traveling expenses including meals and lodging while away from home is in itself the allowance of a deduction of an item that would except for the statutory provision be a least to some extent not deductible because of being a personal or family expense. The statute allows this deduction even though the taxpayer is living with his family in an apartment at the place of his temporary employment and has no duplicative living costs as does a person most often when he is away from home in pursuit of a trade or business. While the personal choice of a taxpayer at a temporary station to move his family to that temporary location rather than to be separated from his family does not cause him [8] to forfeit his deduction for travel expenses provided for under section 162(a)(2), when he returns from the temporary employment and moves his family back to the place of his regular employment, he has not incurred moving expenses in connection with the commencement of work at a "new principal place of work." Whether a taxpayer chooses to move his family to a place where he is temporarily employed or chooses

not to move his family, is a personal decision, and if he chooses to move his family, the family expenses including the moving expenses are a personal expense. Cf. *Commissioner* v. *Flowers*, 326 U.S. 465 (1946). Since in our view the moving expenses of petitioner's household furnishings and his family to and from his place of temporary employment are personal expenses which do not fall within the deduction allowed by section 217, we sustain respondent's disallowance of petitioner's moving expenses.

Petitioner in his alternative contention argues that since he would have had $490.75 of moving expenses for furniture and items which he would have moved even if he had been single, this amount should be allowed as a deduction under section 162 as an ordinary and necessary business expense incidental to his travel away from home. Petitioner states that certainly excess baggage paid by a person on a trip away from home would be considered an ordinary and necessary travel expense and that in his case the moving of furnishings should be equated with the excess baggage costs which might be allowed. We need not pass on whether, or to what extent, a taxpayer might be allowed costs of moving certain objects to a place of temporary work where a showing is made [9] that is was necessary for him to move these objects and that moving these objects was an ordinary expense. Petitioner testified that for his family's living arrangements, he and his wife determined that it was about equally costly to move his furniture to Washington as it would have been to store that furniture and rent a

furnished apartment in Washington. However, petitioner made no showing as to any necessity of moving furniture for himself alone or as to any comparable costs of moving such furniture and obtaining unfurnished quarters in Washington, D.C. for himself alone.[3]

Since petitioner has totally failed to show that the cost of moving the furnishings that he would have moved had he been single is an ordinary and necessary business expense under the facts of this case, we need not decide whether under any circumstances such an item of expense might be deductible as an ordinary and necessary travel expense while away from home in the pursuit of a trade or business.

Because of respondent's concession of a slight increased deduction for petitioner's traveling expenses from Washington, D.C. to Lexington, Kentucky,

Decision will be entered under Rule 50.

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3. Petitioner stated in the record, in response to a question from respondent's counsel, that in another return not in this record he had attached a letter from a rental agent as to the cost of renting a 1-bedroom apartment and that it was that figure that was used for the deduction on the cost of rental. This testimony is far from sufficient to show any necessity for petitioner's moving furniture as distinguished from renting a furnished apartment or what the rental cost of a furnished apartment in Washington, D.C. for one person would be.